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No. 1323

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

THE STATE OF IDAHO,

Plaintiff-Respondent,

-vs-

JAMES B. POLSON,

Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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Appendix A (Constitution and Statutes set forth in full)	Attached

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CITATIONS

UNITED STATES CONSTITUTION:

Article 1, Section 10
Amendment 5
Amendment 8
Amendment 13
Amendment 14

UNITED STATES STATUTES:

28 USC 1257

IDAHO STATUTES:

18-4015
19-2514

CASES:

State of Idaho v. Polson, 448 P2d 229

Sheppard v. Maxwell, 384 US 333, 86 SCt 1507

Estes v. Texas, 381 US 532, 14 L ed 2d 543, 85 SCt 1628

Irvin v. Dowd, 366 US 717, 6 L ed 2d 751, 81 SCt 1639

Marshall v. United States, 360 US 310, 3 L ed 2d 1250, 79 SCt 1171

State v. Scroggins, 91 Ida 847, 433 P2d 117

Calder v. Bull, 3 Dall. (US) 386, 1 L ed 648

Rupert v. State, 9 Okla Crim. 226, 131 Pac. 713

United States v. Dowd, 271 Fed 2d 292

OPINIONS BELOW

Defendant was charged, and convicted, by jury verdict, in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, of the crime of assault with intent to commit murder, and of being a persistent violator of the law. There is no opinion from said court. The judgment of conviction on both counts was appealed to the Supreme Court of the State of Idaho, which court affirmed the conviction of the charge of assault with intent to commit murder, but reversed the conviction of being a persistent violator of the law and remanded the matter for new trial upon that charge alone. The opinion and decision of the Idaho Supreme Court entered December 9, 1968, is reported at 448 Pac. 2d 229. (Rehearing denied January 3, 1969.)

JURISDICTION

Jurisdiction is invoked in this cause pursuant to 28 USC 1257, for the review of a state supreme court decision and also because this case involves a serious question of pretrial publicity and publicity during trial which resulted in an atmosphere in which the defendant was denied a fair trial in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; further that this cause involves the application of a recidivism statute in violation of the double jeopardy and due process of law provisions of Amendment 5 and 14 to the United States Constitution, of Article 10 of the Constitution prohibiting the enactment of ex post facto laws, of Amendment 8 to the Constitution prohibiting cruel and unusual punishment, and of Amendment 13 to the Constitution prohibiting involuntary servitude except as punishment for a crime.

QUESTIONS PRESENTED

1. Was the petitioner denied due process of law as a result of pretrial publicity and publicity during trial, which resulted in an atmosphere denying the petitioner a fair trial.

2. Is the Idaho recidivist statute as applied to this petitioner violative of the provisions of the United States Constitution forbidding

(a) ex post facto laws

(b) double jeopardy

(c) cruel and unusual punishment

(d) denial of due process and equal protection of the law

(e) involuntary servitude.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional and statutory provisions are set forth in Appendix A, infra:

UNITED STATES CONSTITUTION:

Article 1, Section 10

Amendment 5

Amendment 8

Amendment 14

Amendment 13

UNITED STATES STATUTES:

28 USC 1257

IDAHO STATUTES

18-4015

19-2514

STATEMENT

Petitioner was arrested upon a charge of assault with a deadly weapon with intent to murder, under Idaho Code Section 18-4015, following a shooting incident in Idaho Falls, Idaho, on May 2, 1966. The petitioner and one Carl Holm, a longstanding acquaintance, were both in possession of pistols and exchanged shots with each other in a bar on said date; the petitioner was wounded, but Holm was not.

Following trial and conviction upon said charge, the petitioner was also tried for being a persistent violator of the law under Idaho's recidivism statute, Section 19-2514, Idaho Code.

Petitioner was sentenced to serve the maximum penalty of 14 years imprisonment upon the assault charge, and to an additional 10 years on the conviction of recidivism.

Upon appeal to the Idaho Supreme Court, the conviction of assault with a deadly weapon with intent to murder was affirmed and the conviction for being a persistent violator of the law was reversed and remanded for a new trial.

Certain errors occurred in the charging, trial, sentencing and appeal of the petitioner that we deem to be in violation of the rights afforded him under the United States Constitution.

REASONS FOR GRANTING WRIT

Writ of certiorari should be granted to review

the matters raised as follows, under the sub-headings of Publicity, Ex post facto, Double Jeopardy, Cruel and Unusual Punishment, Due Process and Equal Protection of the Laws, and Involuntary Servitude.

(A) Publicity.

During the trial of petitioner, it was brought to the attention of the trial court, that extensive publicity had occurred prior to the trial. The affidavit of the petitioner's trial attorney, Robert Hillman (who is since deceased), is included in the record submitted by the Clerk of the Supreme Court of the State of Idaho to show the nature and extent of the publicity involved. The Court was aware of this publicity and noted, during trial:

> "THE COURT: Now, lady and gentlemen of the jury, counsel for the defendant advises me that last evening on one of the television stations there was something concerning this trial. I want to admonish the jury that whatever might have been on that television set could

never have been more than the opinion of one writer. It could have nothing to do with this trial, and I would admonish you to pay absolutely no attention to it, whatever.

"This would come up in connection with the so-called new rights of the people to know, I presume. But, in any event, it would not have anything to do with your determination in this case.

"I don't know how many of you saw this broadcast. I didn't. But it something I feel ought to be called to your attention, and therefore I am admonishing you concerning it.

"What you will determine will come from this witness stand, and no place else. And what I will get the law on in connection with this case will come from the cases as it applies to the evidence in this case."

The affidavit of petitioner's attorney, Mr. Hillman, indicates that this publicity was sufficient to cause the jury to form a preconception of guilt and thus prevent them from arriving at a fair and independent verdict.

The Honorable Supreme Court of the United States of America in recent years has jealously

protected the right of due process granted to defendants via the 14th Amendment when adverse and prejudicial publicity permeates the trial atmosphere.

In Sheppard v. Maxwell, 384 US 333, 16 L ed 2d 600, 86 S. Ct. 1507, the court said:

> "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings

> threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

Although the Sheppard trial was described as a "'Roman Holiday' for the news media" and a "carnival atmosphere at trial", the court set the guidelines of due process applicable to such situations, and applicable also to the position of the petitioner, contrary to the holding of the Supreme Court of the State of Idaho, that in the petitioner's case "the record does not show an aura of community prejudice from the publicity

complained of; that the defendant's case was prejudicial; that he was denied a fair trial; or that he was denied due process of law;" (448 P2 at 235), the United States Supreme Court in Estes v. Texas, 381 US 532, 14 L ed 2d 543, 85 S Ct 1628, at page 542 of the U S Reports espoused:

> "The State, however, says that the use of television in the instant case was 'without injustice to the person immediately concerned,' basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

Irvin v. Dowd, 366 US 717, 6 L ed 2d 751, 81 S Ct 1639, in discussing the effect of news upon

the community from which a jury is to be drawn recognizes "'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the court lays down no particular tests and procedure is not chained to any ancient and artificial formula.

"Here the build up of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing."

The court then goes on to detail the inflammatory adverse publicity associated with that case; not unlike the atmosphere and stories relating to petitioner herein. It would be unrealistic to say that the continued adverse publicity did not result in the education and informing of the community in a biased and aroused manner.

Marshall v. United States, 360 US 310,

3 L ed 2d 1250, 79 S Ct 1171, is another case which this court summarily dealt with the exposure of the venire to adverse trial publicity. There it was held that although the trial judge did not feel that there was any prejudice to the defendant from the jury obtaining information from newspaper articles, which information consisted of inadmissible evidence, the defendant was entitled to a new trial free from such an aura that might have affected the jury's deliberation.

It must be noted to this Honorable Court, that the Idaho Supreme Court, in denying petitioner's contention regarding prejudicial publicity, relied upon its recent decision of State v. Scroggins, 91 Idaho 847, 433 P2d 117 (1967). That case involved one newspaper article; not eleven as we have in the present case.

(B) Ex post facto.

Article 1, Section 10, of the United States Constitution provides inter alia that "no state shall * * * pass any * * * ex post facto law, * * *" An ex post facto law has been defined as one that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

Calder v. Bull, 3 Dall. (US) 386, 1 L ed 648.

Applying these rules to the case at hand, we would argue that petitioner, when charged with violating Idaho Code Section 19-2514, the recidivism statute, was subjected to an ex post facto law, for that law imposes a greater punishment for criminal conduct, upon third conviction, regardless of the crime (as long as it is a felony) than would or could be imposed for the prior offenses. The various offenses are not punishable in increasing degrees based upon number of occurrence, except for the recidivism statute.

It is not logical nor realistic to say that the application of the recidivist provision is not an ex post facto situation.

(C) Double Jeopardy.

Amendment 5 to the United States Constitution provides in part that "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

This provision protects an accused against peril of a second punishment for the same criminal conduct.

See Rupert v. State, 9 Okla Cr. 226, 131 Pac. 713.

It is submitted that application of the recidivist statute of Idaho, Section 19-2514, Idaho Code, in this case amounts to double jeopardy. Petitioner has been convicted of three felonies, sentenced therefor, and served his debt to society for said acts. To assess additional punishment, based upon

prior conduct for which the petitioner has been punished, again, in both reason and logic, can amount to nothing more than double punishment, in contravention of Amendment 5 of the Constitution.

(D) Cruel and Unusual Punishment.

Amendment 8 of the Constitution of the United States states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Emphasis supplied)

Idaho's various criminal statutes provide for the maximum fine and punishments for violation thereof. These punishments are the usual punishments for breach of the statutes. Application of the recidivist statute to a third felony which would otherwise be punished in the usual manner applicable to the prior two felonies, would be unusual or not usual punishment and

would be in contravention of the provisions of Amendment 8 of the Constitution. To say otherwise would be closing our eyes to reality.

(E) Due Process and Equal Protection.

Amendment 14 to the Constitution of the United States places the following restriction upon the various states:

> "nor shall any state deprive any person of life, limb, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The terms "due process" and "equal protection of the laws" encompass a fundamental principle of justice circumscribing the power of the government with a substantive control, guaranteeing to the individual that he shall be treated in no different manner than other individuals and that his treatment shall be according to established rules and procedure. The problem that we face with recidivist statutes such as exist

in Idaho, is that the accused is treated differently than others; is subject to greater sanctions and punishments than are normally applied to first or second offenders; and is placed in the position of being discriminated against, depending on the whim of the prosecutor, who has the sole, omnipotent choice of who shall be selected to be charged under the statute.

(F) Involuntary Servitude.

Amendment 13 to the Constitution of the United States provides that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

There are authorities on both sides of the question of whether recidivist statutes are a crime, or whether they are merely a status which entitles a court to assess additional punish-

ment. Most cases follow the latter approach. Typical of this is the statement of the Seventh Circuit Court of Appeals in the case of U. S. v. Dowd, 271 F2d 292, wherein it is stated at page 295 of the Federal Report:

> "The state or condition of being a habitual criminal is not a crime but it is a status or circumstance which affords a proper basis for classifying such individual as one subject to greater or additional punishment than would otherwise be imposed upon conviction of a subsequent offense."

As argument, we urge the position of Judge Parkinson, who dissented in the Dowd case. The 13th Amendment does not read "punishment incidental to crime", nor "punishment for criminal conduct by commission of repetitive felonies for which the full statutory punishment has been inflicted". It clearly and succinctly states "as a punishment for crime".

It is submitted that punishment for a status, not for a crime, clearly violates the 13th Amendment.

CONCLUSION

It is respectfully presented herein that this court should accept certiorari in this matter by issuance of its writ, to review the constitutional issues raised herein.

WHEREFORE, petitioner prays for issuance of a writ of certiorari.

Dated this 31st day of March, 1969.

Respectfully submitted,

DERR, DERR & WALTERS

By _____
Allen R. Derr, Of the Firm.
817 W. Franklin Street
Boise, Idaho 83702

I hereby certify that on April 1, 1969, I served a true and correct copy of the foregoing Petition for Writ of Certiorari by mail, postage prepaid, on the Attorney General of the State of Idaho and the Prosecuting Attorney of Bonneville County, State of Idaho.

_____
Allen R. Derr

United States Constitution, Article 1, Section 10:

"(1) No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

"(2) No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to revision and control of the congress.

"(3) No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

United States Constitution, Amendment 5:

"(CRIMINAL ACTIONS--PROVISIONS CONCERNING--DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES.)--No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution; Amendment 8:

"(BAIL--PUNISHMENT.)--Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment 14:

"Section 1. (CITIZENSHIP--DUE PROCESS OF LAW--EQUAL PROTECTION.)--All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. (REPRESENTATIVES--POWER TO REDUCE APPORTIONMENT.)--Representatives shall be apportioned among the several states according to their respective numbers, counting

the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

"Section 3. (DISQUALIFICATION TO HOLD OFFICE.)--No person shall be a senator or representative in congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

"Section 4. (PUBLIC DEBT NOT TO BE QUESTIONED--DEBTS OF CONFEDERACY AND CLAIMS NOT TO BE PAID.)--The validity of the

public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. (POWER TO ENFORCE AMENDMENT.)--The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

United States Constitution, Amendment 13:

"Section 1. (SLAVERY PROHIBITED.)--Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. (POWER TO ENFORCE ARTICLE.)--Congress shall have power to enforce this article by appropriate legislation."

United States Statute, 28-1257:

"STATE COURTS; APPEAL; CERTIORARI.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Idaho Statute, 18-4015:

"ASSAULT WITH INTENT TO MURDER. -- Every person who assaults another with intent to commit murder, is punishable by imprisonment in the state prison not less than one nor more than fourteen years."

Idaho Statute, 19-2514:

"PERSISTENT VIOLATOR--SENTENCE ON THIRD CONVICTION FOR FELONY. --Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to imprisonment in the state penitentiary for not less than five years and said imprisonment may extend to life."